

SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

JOHN BAME AND SKAGIT COUNTY,

Petitioners,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

SHB NO. 05-018

ORDER OF DISMISSAL

This case is an appeal by John Bame (“Bame”) of the Washington Department of Ecology’s (“Ecology”) conditional approval of Shoreline Development Permit No. 2005-NW-20016, a shoreline variance/substantial development permit relating to a dock near Deception Pass. Before the Board is a motion by Ecology to dismiss Bame’s appeal based on Bame’s failure to serve both Ecology and the Office of the Attorney General (“AGO”) within seven days of filing his Petition for Review with the Shorelines Hearings Board (“Board”). Assistant Attorney General John T. Cooke represented Ecology. Attorney Gary T. Jones represented Bame. Skagit County did not participate. The Board for this case consisted of three members pursuant to RCW 90.58.185. The Board members were Bill Clarke, Presiding, Judy Wilson, and Mary-Alyce Burleigh. The Board reviewed this motion on the written record consisting of:

1. Ecology’s Motion to Dismiss and Memorandum in Support of Motion to Dismiss;
2. Declaration of John T. Cooke in Support of Ecology’s Motion to Dismiss;
3. Declaration of Bob Fritzen in Support of Ecology’s Motion to Dismiss;
4. Bame’s Response to Motion to Dismiss; and
5. Ecology’s Reply to Motion to Dismiss.

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3 **BACKGROUND**

4 On June 17, 2005, Ecology's Bellingham Field Office issued its shoreline decision to
5 Bame. The decision was mailed to Bame the same day. Ecology's decision stated

6 The Shoreline Management Act provides that a request for review (appeal) before the
7 Shorelines Hearings Board may be filed within twenty-one (21) days from the transmittal
8 date of this approval. Guidelines for filing a request for review (appeal) are available
9 from the Shorelines Hearings Board at (360) 459-6327.

10 The Board received Bame's Petition for Review on June 28, 2005. As of September 16,
11 2005, Bame had not served the AGO or Ecology. *Declaration of Bob Fritzen; Declaration of*
12 *John T. Cooke.* In responding to Ecology's Motion to Dismiss, Bame did not contest these facts.

13 **ANALYSIS**

14 **[1]**

15 Summary judgment is designed to do away with unnecessary trials when there is no
16 genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). In a
17 summary judgment proceeding, the moving party has the initial burden of showing that there is
18 no dispute as to any material fact. *Hiatt v. Walker Chevrolet*, 120 Wn.2d 57, 66, 837 P.2d 618
19 (1992). A material fact is one upon which the outcome of the litigation depends. *Jacobsen v.*
20 *State*, 89 Wn.2d 104, 569 P.2d 1152 (1977).

21 **[2]**

If a moving party does not sustain its burden, summary judgment should not be granted,
regardless of whether the nonmoving party has submitted affidavits or other evidence in

1 opposition to the motion. Only after the moving party has met its burden of producing factual
2 evidence showing that it is entitled to judgment as a matter of law does the burden shift to the
3 nonmoving party to set forth facts showing that there is a genuine issue of material fact. *Hash v.*
4 *Children's Orthopedic Hosp.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). In ruling on a motion
5 for summary judgment, the Court must consider all of the material evidence and all inferences
6 therefrom in a manner most favorable to the non-moving party and, when so considered, if
7 reasonable persons might reach different conclusions, the motion should be denied. *Id.*; *Wood v.*
8 *Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960). If, on a motion for judgment on the pleadings,
9 "matters outside the pleading are presented to and not excluded by the court, the motion shall be
10 treated as one for summary judgment and disposed of as provided in rule 56." CR 12 (c).
11 Accordingly, the analysis will proceed in a manner similar to a motion for summary judgment.

12 [3]

13 RCW 90.58.180(1) governs filing a Petition for Review with the Board. It states as
14 follows:

15 Any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of
16 the state pursuant to RCW 90.58.140 may, except as otherwise provided in chapter
17 43.21L RCW, seek review from the shorelines hearings board by filing a petition for
18 review within twenty-one days of the date of filing as defined in RCW 90.58.140(6).
19 Within seven days of the filing of any petition for review with the board as provided in
20 this section pertaining to a final decision of a local government, the petitioner shall serve
21 copies of the petition on the department, the office of the attorney general, and the local
government . . .

Under RCW 90.58.140(6), the date of filing of an Ecology decision on a conditional use
or variance is the date the decision is transmitted by the department to the local government.

Thus, the date of filing was June 17, 2005. Bame filed his Petition for Review with the Board on

1 June 28, 2005, well within the 21-day limit. As of September 16, 2005, Bame had not served
2 either Ecology or the AGO.

3 [4]

4 As the Board recently noted, “[i]n several cases, this Board found this service
5 requirement to be jurisdictional, and dismissed the cases for failure to provide the required
6 service.” *Morgan et al. v. Clark County et al.*, SHB No. 05-008 citing *Yakama Indian Nation et*
7 *al. v. Central Pre-Mix Concrete et al.*, SHB Nos. 98-40, 98-41, and 98-42; *Foster v.*
8 *Crookshanks and Cowlitz County*, SHB No. 02-013; *Smith v. City of Redmond and King County*,
9 SHB No. 01-029 (2002). (Order on Motion to Dismiss, July 18, 2005).

10 [5]

11 Bame argues that substantial compliance should apply based on the Board’s rule at WAC
12 461-08-355(6) that states:

13 The board may dismiss a petition for review where there has not been substantial
14 compliance with the filing and service requirements of RCW 90.58.180 and this rule.
15 Substantial compliance will include actual notice of a petition for review.

16 In this case, Ecology had actual notice of Bame’s Petition of Review because the Board,
17 upon receipt of Bame’s appeal, mailed to Bame, Ecology, and Skagit County a scheduling letter
18 providing information on the appeal process. This letter was sent to the parties on June 30, 2005,
19 13 days after the “date of filing” of the shoreline decision by Ecology. The Board’s scheduling
20 letter also included dates for the hearing and Pre-Hearing Conference.

21 [6]

In the context of water rights permitting, substantial compliance has been invoked so that
the substance of a person’s actions governs over a mistake in the form. In *Ecology v. Adsit*, a

1 water right claimant provided necessary information to file a water right claim, but provided the
2 information on the wrong form. The Washington State Supreme Court found that the claimant
3 had substantially complied because

4 . . . [A]lthough the form was incorrect, the substantive information the applicant supplied
5 met the legislative intent by providing adequate records for administration of the state's
6 waters and notifying the State that the water was being put to beneficial use.

7 *Ecology v. Adsit*, 103 Wn.2d 698, 704 (1985)

8 [7]

9 Ecology had actual notice of Bame's Petition for Review, but not because Bame
10 substantially complied with the service requirements of the SMA and the Board's rules. Rather,
11 Ecology only had actual notice because of the scheduling letter mailed by the Board. Thus, the
12 Board concludes that Bame did not comply with the service requirements of the SMA at
13 90.58.180(1), and that Bame did not substantially comply with the service provision in the
14 Board's rules at WAC 461-08-355(6) because Bame never served anyone. Unlike the *Adsit* case
15 in which the substance trumped the improper form, there was neither proper form nor substance
16 to Bame's service. The Board's rule provision allowing substantial compliance with service
17 requirements is not relevant when there is no service at all.

18 [8]

19 Ecology's statement in Bame's letter did not include complete instructions for filing and
20 serving a Petition for Review, but did include direction on how to obtain additional information
21 on filing a Petition for Review. Bame thus argues that a duty of disclosure should be imposed
on Ecology to include complete appeal instructions, and that the public interest requires that
Bame's appeal not be dismissed on procedural grounds. While the Board is sympathetic, and

1 notes that the appeal language in the permit decision could have been more instructional, the
2 Board has previously held that failure to serve a Petition for Review means that the Board does
3 not have jurisdiction over the case. This bright line rule is necessary to provide clarity in the
4 appeals process.

5 **[9]**

6 Based on the foregoing analysis, the Board enters the following:

7 **ORDER**

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9 Ecology's Motion to Dismiss the case for lack of jurisdiction is GRANTED and the case
10 is DISMISSED.

11 SO ORDERED this 2nd day of November 2005.

12
13 **SHORELINES HEARINGS BOARD**

14 BILL CLARKE, Presiding

15 MARY-ALYCE BURLEIGH, Member

16 JUDY WILSON, Member
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